EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Tia Hall, individually and on behalf of all others similarly situated,

Plaintiff,

-v- Case No. 21-11811

Farm Journal, Inc., d/b/a Farm Journal Media,

Defendant.
_____/

MOTION TO DISMISS
April 5, 2022

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge

Theodore Levin United States District Courthouse
231 West Lafayette Boulevard
Detroit, Michigan

APPEARANCES:

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(Appearances Continued to Following Page)

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Detroit, Michigan

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2:46 p.m.

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THE CLERK: All rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable David M. Lawson presiding.

THE COURT: You may be seated.

THE CLERK: Now calling the case of Hall v. Farm Journal, Inc., Case Number 21-11811.

THE COURT: Good afternoon, counsel. May I have an appearance for the plaintiff?

MR. HEDIN: Good afternoon, your Honor. Frank Hedin on behalf of the plaintiff.

THE COURT: All right. You may remain seated when you address the Court, presently, under our COVID protocol.

For the defendant, please?

MR. HUGET: Yes. Good afternoon, your Honor. Michael Huget and Robert Riley.

THE COURT: Which one will be arguing?

MR. HUGET: I will, your Honor. Michael Huget.

THE COURT: All right, Mr. Huget.

Did you read Judge Ludington's opinion?

MR. HUGET: Yes, your Honor.

THE COURT: How is this case different?

MR. HUGET: Honestly, I think Judge Ludington, with all due respect, got it wrong.

THE COURT: Well, okay. So it's not a matter of trying to distinguish that opinion, you just think that a different result should result?

MR. HUGET: Absolutely. If Judge Ludington had followed Michigan case law, Michigan Supreme Court, if he had followed other precedent in this court, in the Sixth Circuit, he wouldn't have come to the conclusion -- or shouldn't have come to the conclusion that simply because it's a statutory cause of action a three-year statute or a six-year statute of limitation applies.

This Court, in a case we cited, the Herrin v. Dunham case, you held that a three-year statute of limitations applied to a 1983 claim in the absence of any other statute of limitations.

THE COURT: Well, right, but that -- there's plenty of precedent for that. In fact, there is a Sixth Circuit case that says exactly that, that a 1983 claim is governed by Michigan's three-year statute of limitations.

Do we have any Michigan case law that determines which limitation statute applies to Preservation of Personal Privacy Act claims?

MR. HEDIN: None, your Honor, other than Judge Ludington's decision a few weeks ago.

THE COURT: I meant from a Michigan court.

MR. HUGET: No. I don't think there have been Michigan court -- I think these have all been Federal court cases, cases in Federal court, I believe, your Honor. I'm not aware of any State court.

THE COURT: Okay. Anything further then? Go ahead with your argument, if you like.

MR. HUGET: Oh, thank you, your Honor.

No, I just think that -- and the reason, you know, when you look at -- the courts basically indicate, the Michigan courts in particular, that when you're looking in the absence of a statute of limitations that set forth, what do you look at, when you look at the nature and origin of the claim, what does it arise from?

And the courts in Michigan have said that courts determine whether the claim is founded on a consensual duty or obligation or the breach of an express promise on the one hand, or, on the other hand, whether the claim is founded on a nonconsensual duty or one imposed by law.

If it's the latter, the action is generally governed by the three-year statute of limitations found in MCL 600.50 -- sorry -- 5805(2).

So when you turn to this case it's important to look at the nature of the claims being asserted.

The closest analogy is really, this is an invasion of

privacy claim. Plaintiff alleges, at various points, various privacy-type injuries. And it says in paragraph 47 that she complains that Farm Journal's alleged use of her subscriber data discloses customer reading habits and preferences that can reveal intimate facts about our lives or our political and religious beliefs or our health concerns.

That's a privacy, that's a personal injury she is alleging, and it's clearly founded on a nonconsensual duty imposed by law. As such, this should fall within the three-year statute of limitations bucket, not the six-year.

The six-year cases that have all been cited where courts have determined that there is a six-year statute of limitations, when you really peel those back, they are cases that sound in contract in some way.

For example, the Palmer Park case that they rely on quite a bit is a penalty interest case, I believe, that arose out of a statute that applied penalty interest when insurance claims weren't paid timely enough. Insurance claims, an underlying insurance contract, not a personal right, not a personal -- invasion of a personal right or personal injury.

So when you look at the case law in Michigan, the plaintiff urges this Court to adopt a rule that is simply -- if it's a -- if the claim arises out of a statute, you must apply the six-year statute of limitations.

But when you look at all the Michigan cases we cited,

there are numerous cases that have applied a three-year statute of limitations. The Garg v. Macomb case, a three-year statute of limitations applied to a retaliation claim brought under the Elliott-Larsen Civil Rights Act.

THE COURT: Well, doesn't the Elliott-Larsen statute have its own statute of limitations?

MR. HUGET: No, it does not.

THE COURT: All right.

MR. HUGET: Same with the Stewart's Estate v. Armstrong case, the Armstrong case that we cited.

THE COURT: Stewart's Estate v. Armstrong?

MR. HUGET: Yes. I'm sorry. I'm a little dry.

THE COURT: No, no problem.

MR. HUGET: That was a wrongful death claim. Wrongful death claims in Michigan arise by statute, not by common law, and yet they applied a three-year statute of limitations there.

I could go on, your Honor, but I think that's -- the job that the Court has to do is starting with the nature and origin of the claim and then go from there, not simply decide that because it's a statutory cause of action the six-year must apply.

And that's the essence of our argument, your Honor.

THE COURT: Did you take a look at Palmer Park Square v. Scottsdale Insurance?

MR. HUGET: Yes, your Honor.

THE COURT: And tell me why that doesn't govern here. You didn't deal with that very much in your brief.

MR. HUGET: Yes, your Honor. Palmer Park, when you look at it in the context of the consensual duty or the nonconsensual duty, when you look at the facts of the case, the underlying claims related to the failure to pay on an insurance contract. The question became the statute of limitations applied to Michigan's penalty interest statute that kicks in when insurance claims aren't paid timely.

This case falls cleanly into the bucket of a breach of an express promise bucket and not the injury to -- a personal injury or property. It arises out of the failure to pay on an insurance contract, your Honor. That's why it's distinguishable.

THE COURT: Okay. Thank you.

Who is arguing for the plaintiff?

MR. HEDIN: I will be, your Honor. Frank Hedin on behalf of the plaintiff.

THE COURT: All right. Did you file an appearance?

MR. HEDIN: I did, your Honor.

THE COURT: All right. Go ahead, Mr. Hedin.

MR. HEDIN: Your Honor, Judge Ludington, in the Pratt v. KSE Sportsman Group opinion issued recently concerning the statute of limitations for a PPPA claim, considered and rejected all of the arguments, the same exact arguments with

respect to the same cause of action that the defendant is raising here.

THE COURT: Well, I don't think the defendant disputes that. I think the defendant acknowledges that this is almost a cookie-cutter-type case, but he says Judge Ludington got to wrong.

MR. HEDIN: Judge Ludington got it right, your Honor.

THE COURT: I'm shocked to hear you say that.

MR. HEDIN: As Judge Ludington's opinion explained, the Sixth Circuit in Palmer Park Square unequivocally held that the residual six-year statute of limitations in Section 5813 applies to statutory causes of action.

And the Sixth Circuit cited to DiPonio Construction and to Department of Environmental Quality v. Gomez, two Michigan Court of Appeals decisions, both of which hold that statutory claims across the board are subject to the six-year limitation period because those claims do not arise from a breach of a common-law duty, they arise from a statutory duty.

Judge, the Sixth Circuit, in Palmer Park Square, noted that there was no controlling authority in Michigan on the question of whether the six-year period applies to a statutory cause of action, but it surveyed decades worth of jurisprudence across Michigan and came to the conclusion that in predicting what the Michigan Supreme Court would ultimately decide on the question, that the six-year period applied to statutory causes

of action.

THE COURT: Well, how do you answer Mr. Huget's attempt to distinguish that on the basis that the claim in that case was for penalty interest that arose out of a breach of an insurance contract?

MR. HEDIN: So the claim in Palmer Park Square did not -- was actually found not to arise from the contract, it was found to arise from the statute. It was a claim for untimely payment of insurance benefits.

THE COURT: Under a contract.

MR. HEDIN: Correct. But the Sixth Circuit held that that was not a claim under the contract, it was a claim under the statute. And notably, the Sixth Circuit in Palmer Park Square applied this consensual duty versus nonconsensual duty test in determining which statute of limitations period to apply.

And the Sixth Circuit explained that that's the test that applies when you're distinguishing -- when you're determining whether to apply the breach of contract statute of limitation period or a tort statute of limitation period, either the three-year or the six-year. It does not apply in a case where there is no contractual basis for the claim whatsoever, such as in this case.

For example, another case that applies the consensual versus nonconsensual breach standard is -- excuse me,

your Honor -- Miller Davis. And this is actually where the test comes from. That was another contract case where the Court said, well, if it's a consent -- if it's a breach of a consensual duty, in other words, one imposed by a contract, then the contract statute of limitations period applies, the six-year period, and if it's breach of a nonconsensual duty, that is, one imposed by law, whether it be common law or statutory, you have to -- then at that point you have to determine which of those two applies, the three-year or the six-year.

But where it's not a contract case, the test has no application. If that were the test in a -- in determining whether a statutory cause of action is subject to the three-year or the six-year period, every duty imposed by statute is nonconsensual. So under the defendant's logic, every statutory cause of action would be subject to a three-year period.

But we know that's not the case. Palmer Park Square says the exact opposite, that statutory causes of action are subject to the six-year period, full stop.

That's what Judge Ludington held. That's what the Michigan Court of Appeals held in DiPonio. That's what the Michigan Court of Appeals held in Gomez. It's what the Michigan Supreme Court held in Goldfarb.

And the list goes on, including, recently, a Court in

this District in 2009, in Purnell v. Arrow Financial Services, the Court actually addressed head on the same type of common-law analog or resemblance to common-law argument that the defendant is making here saying, well, it's -- you know, it resembles a breach or an invasion of privacy claim at common law, so it's subject to the three-year period.

The Court in Purnell specifically --

THE COURT: You acknowledge, do you not, that except for Pratt, none of those cases dealt with the PPPA; correct?

MR. HEDIN: That's correct, your Honor.

THE COURT: All right. Continue.

MR. HEDIN: In Purnell the Court addressed the argument, the common-law analog argument and said the mere fact that plaintiff's allegations may in some manner be shoe-horned into a common-law tort cannot control in light of the clear directive that where a claim is for a statutory violation the six-year period in Section 5813 applies.

That is exactly what we have here. This is a claim not for personal -- for damages for injury to a person or a property. This is a claim for violation of a statute, a breach of a statutorily imposed duty not to disseminate this type of personal information without consent. That's what the claim arises from. It does not arise at common law.

And for those reasons, we believe that Palmer Park Square controls and that the Court should apply that holding

faithfully.

THE COURT: Thank you.

Mr. Huget, any further argument?

MR. HUGET: Your Honor, the only point I will make is that we don't take the position that every claim should apply a three-year statute of limitations.

THE COURT: No, I don't think he is saying that you do. I think he is saying that if we follow your logic, that's where it leads us.

MR. HUGET: Well, the only -- well, and I would disagree with that logic.

The only logic here is that their position is that every statutory claim should now be subject to a six-year statute of limitation. They are saying that's the effect of Judge Ludington's opinion, your Honor. This just can't be the case. That would be inconsistent with numerous cases that we cited earlier. I won't repeat those, but they are in our brief, and I talked about those earlier.

THE COURT: All right.

MR. HUGET: Thank you, your Honor.

THE COURT: Thank you.

It's kind of a rarity that an issue that's been teed up in motion papers is directly decided by another court only weeks before the oral argument is scheduled, and that's what we have here with the decision by Judge Ludington in the

Pratt case.

The issues are very clear, and that is, which statute of limitations governs this dispute under this particular statute.

There is no significant litigation history under the PPPA in Michigan courts, Michigan appellate courts, and there are no cases decided by the Michigan Supreme Court or the Michigan Court of Appeals that continue -- that considers which period of limitations applies under which statute.

The Pratt case held that Section 600.5813 applies, which establishes a six-year period of limitations. And the significance of that -- the significance of that has to do with another -- oh, I suppose -- anomalous situation, and that is the fact that the Michigan Legislature amended the PPPA to eliminate the mandatory statutory damage award of $5,000 per incident for events that occurred before 2016.

And it is obvious to me that the plaintiff attempts to take advantage of the now-superseded statute which was not repealed, it was just amended, by claiming that the statutory violation took place prior to the amendment so that that statutory damage award would apply if liability is considered.

Now, as we have discussed, the Sixth Circuit recently considered, in Palmer Park, the statute of limitations that's applied to claims brought under Michigan statutes that do not specify a limitation period, and that Court relied on the

Michigan Court of Appeals decision in Gomez and also DiPonio and distinguishing actions for statutory violations with actions to redress injuries resulting from traditional torts. The Court held that Section 5813's catch-all provision applies to statutory causes of action, including those for civil fines.

How do we deal with 1983 cases, then?

Under 1983, the Supreme Court has held that the analogous statute of limitations in the particular state is the one that applies.

Well, 1983, Section 1983 of Title 42 of the United States Code does not create a substantive cause of action. It is essentially an enabling act that allows a litigant deprived by someone acting under color of law of rights established by other provisions of law, that is, the Constitution or laws of the United States, to bring a claim.

And the Sixth Circuit had determined that constitutional torts, that is, torts that -- or I should say, wrongs that occur in violation of a duty imposed by the operation of law as opposed to operation of contract are the most analogous types of causes of action that trigger the three-year statute of limitations under those rules that govern Michigan tort claims.

Frequently, 1983 claims are referred to as constitutional torts. And so I don't believe that an analogy drawn to Section 1983 is particularly helpful in determining

the statute of limitation that applies here.

The defendant really does not acknowledge or attempt to distinguish Palmer Park much in its brief and it really tends to mischaracterize the DiPonio decision on which Palmer Park relies.

DiPonio did not limit the applicability of the six-year catch-all statute of limitations in Section 5813 to statutory violations having no common-law analog, as the defendant asserts. Instead, DiPonio recognized that Michigan courts consistently have applied Section 5813 to cases where, and I'm quoting, "The right to recovery arose from a statute rather than a common-law right," not a statutory right that had some analog in the common law, such as an invasion of privacy, but a right that arose from the statute itself.

The DiPonio Court then explicitly held that a civil cause of action arising from a statutory violation is subject to the six-year limitation period in Section 5813 if the statute itself does not provide a limitation period.

The authority that Farm Journal does cite is not particularly apposite. Several of the cases it cites where the Court applied a three-year statute of limitations deal with common-law invasion of privacy claims.

The plaintiff has not brought a common-law claim here. Instead, she seeks to vindicate her statutorily conferred rights.

Farm Journal also cites several cases for the unremarkable proposition that the PPPA claims implicate privacy concerns, but the defendant has not cited any authority holding that under Michigan law courts must view every privacy-related claim as a tort for the purposes of determining the relevant statute of limitations or limitation period.

In fact, all of the cases described by the PP -- describe the PPPA as creating a privacy right in the respective matter.

Michigan courts have rejected the common-law analog argument holding that Section 5813's catch-all six-year statute of limitations governs statutory claims notwithstanding the similarity of such claims to common-law torts, such as in the Estes matter.

The Miller-Davis case, a Michigan Supreme Court case from 2011 cited by the defendant, also is distinguishable. In that case the Michigan Supreme Court considered whether the statute of limitations for tort or contract claims applies in a dispute regarding building defects.

Although the Court noted that the actions founded on a nonconsensual duty or one imposed by law are generally governed by a three-year statute of limitations, it did so only in the context of comparing tortious and contractual duties. It did not hold that every action involving nonconsensual duties is governed by Section 5805's three-year statute of limitations

and there were no statutory claims in that case.

If anything, the logic of Miller-Davis favors the plaintiff's position because the plaintiff there did not rely on any duty implied in law, but brought her claims solely under the PPPA -- that is, in this case -- and Miller-Davis suggests that the statute of limitations described in tort actions does not apply here.

The plaintiff's claim is governed by Section 5813, and therefore, the claim appears to be timely for the purpose of this motion.

The defendant also contends that the plaintiff lacks Article III standing because it basically sets up a catch-22 for the plaintiff, stating that if the six-year statute governs then the plaintiff cannot establish that she suffered a concrete and particularized harm under the Supreme Court decisions that deal with statutory causes of action, most particularly, Spokeo v. Robins.

The argument regarding statute of limitations, of course, is not jurisdictional, and I don't take the defendant to state that if the claim is voided by the statute of limitations that dispenses with the Article III standing argument. I think everyone agrees that statutes of limitations are essentially claims-processing rules absent legislative language to the contrary.

Second, though, it is well established that a properly

pleaded PPPA claim confers Article III standing, and the Sixth Circuit addressed that precise issue in Coulter-Owens, another decision that was not discussed by the defendant.

The Court of Appeals in that case held that Spokeo does not apply where the plaintiff alleges a violation of the PPPA's most basic substantive provision, and that is, the privacy in one's reading materials. A substantive violation occurs when a person's information is disclosed in violation of the statute.

The plaintiff alleged that Farm Journal knowingly disclosed her subscriber and other demographic data, and therefore, she pleaded a cognizable injury in fact for the purpose of Article III standing.

So there is no jurisdictional deficit here, subject matter jurisdictional deficit, and the statute of limitations does not bar this claim at this stage of the case.

I don't know that I have -- have I given you a scheduling order in this case yet?

MR. HEDIN: I do not believe so, your Honor.

THE COURT: And are you seeking to certify a class?

MR. HEDIN: Yes.

THE COURT: All right. I think what I will do, if you have a few minutes, if you're prepared to do that, is conduct a case management conference so we can get a scheduling order on the books.

Do you have some time to do that this afternoon?

MR. HUGET: Sure, your Honor.

MR. HEDIN: Certainly, your Honor.

THE COURT: We can do that in the courtroom if you'd like, off the record, or we can do it in chambers. Are you comfortable meeting in chambers or would you rather not?

MR. HUGET: I'm comfortable with that.

MR. HEDIN: Yes, plaintiff is comfortable with that.

THE COURT: All right. I'll just see you in chambers and I'll recess court.

THE CLERK: All rise. Court is now in recess.

(Proceedings adjourned at 3:12 p.m.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Rene L. Twedt **April 6, 2022**
RENE L. TWEDT, CSR-2907, RDR, CRR, CRC Date
Federal Official Court Reporter